IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 19

FILED
JUN 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-1514

MARION R. HESSE, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT B. MITCHELL, JR.
509 Linden Street,
Allentown, Pa. 18101

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No.

MARION R. HESSE, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit entered on March 10, 1975.

CITATION TO OPINIONS BELOW

The opinion of the United States Tax Court below is printed in Appendix C hereto and is reported at 60 T.C. 685. The memorandum and order of the Tax Court denying Petitioner's motion for further trial, printed in Apendix B hereto, was not reported. The judgement order of the Court of Appeals which affirmed the decision of the United States Tax Court, printed in Appendix A, was not accompanied by an opinion.

JURISDICTION

The judgement of the Court of Appeals, printed in Appendix A hereto, was entered on March 10, 1975. The Court of Appeals stayed its mandate for 30 days on March 31, 1975. A further stay of mandate was granted on May 2, 1975 to May 31, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

1. The first question presented is whether payments made pursuant to a post-nuptial agreement dated October 17, 1967 (which contained a condition precedent requiring the entry of a Decree of Divorce A.V.M.) are "periodic payments" under Section 71 of the Internal Revenue Code of 1954 when the divorce decree was issue on December 11, 1967 and the due date of the final payment is December 1, 1977, a less than ten year period.

2. If the first question is answered affirmatively, then the second question is whether the payments made pursuant to the post-nuptial agreement are properly excluded from the petitioner's gross income under Section 71(a)(1) of the Internal Revenue Code because they are in the nature of a property settlement rather than in discharge of a legal obligation incurred because of the marital or family relationship.

3. Whether the United States Tax Court erred in denying the Motion of petitioner, Marion R. Hesse, for a further trial.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The Statute involved is Sect. 71 of the Internal Revenue Code of 1954 and the finally adopted income tax Regulations thereunder. Because these provisions are lengthy, their pertinent text is set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner and her husband were married in 1944. In the early part of 1966, her husband separated from petitioner with the intent to obtaining a divorce so that he could remarry. At the time of the separation, the husband was the owner of at least 25,000 shares of stock in Harcourt, Brace and World, Inc., acquired as gifts from his parents.

In March, 1966, the husband filed a com-

plaint for divorce a vinculo matrimonii (commonly referred to as divorce A. V. M., or absolute divorce), with the Court of Common Pleas of Northampton County, Pennsylvania, Under Pennsylvania law, a divorce A. V. M. severs the marital relationship, allows the parties to remarry, and terminates the husband's obligation to support the wife. Thereafter, the parties, through their attorneys, entered into a period of extensive negotiations with respect to their respective rights and obligations.

On October 17, 1967, the parties finally reached a compromise and signed an agreement which was contingent upon the entry of a decree of absolute divorce. In the agreement, the parties expressed a "desire to define their future relationship to each other and to agree upon a full and complete settlement of their property rights", and accordingly, the agreement addressed itself to the various rights of the parties. With respect to the cash

settlement, it was agreed that petitioner was to be paid the sum of $500,000, the first payment to be made in cash 10 days after entry of a final decree of absolute divorce, and the remainder to be paid in 10 annual installments of $45,000 each. The obligation to make annual payments was to be secured by an escrow deposit of Harcourt, Brace stock worth $450.000 and the payments were to be made regardless of the death of either party.

A final decree of divorce was entered on December 11, 1967. The husband thereafter paid petitioner $50,000 in 1967 and $45,000 in both 1968 and 1969. The respondent determined that such payments were taxable to petitioner under Section 71(a) of the Internal Revenue Code of 1954. Petitioner appeals from the United States Tax Court's decision that federal income tax deficiencies are due from her for the years 1967, 1968 and 1969 in the amounts of $15,770.98, $17,972.42 and

$12,840.78, respectively. The case was consolidated in the Tax Court with a related proceeding instituted by petitioner's former husband for the redetermination of deficiencies determined against him for the years 1967 and 1968. The issue in these cases was whether payments made by the husband to petitioner pursuant to a written agreement incident to their divorce, were includable in petitioner's income under Section 71(a) of the Internal Revenue Code of 1954 and deductible by the husband under Section 215 of the Code, as periodic payments made in discharge of a legal obligation incurred because of the marital or family relationship. The sole issue tried was whether such payments were in lieu of alimony or support, or whether they were intended instead as compensation for petitioner's property rights.

On August 7, 1973, the Tax Court filed its findings of fact and opinion which is reported at

60 T.C. 685, holding that the payments in issue were in lieu of alimony and were therefore, includable in petitioner's gross income under Section 71 and deductible by the husband under Section 215 of the Code.

On September 6, 1973, petitioner filed a motion for further trial and an accompanying affidavit contending that the attorney who had represented her at the trial committed gross error because the payments were not "periodic" within the meaning of Section 71(a) and (c) of the Internal Revenue Code of 1954 and that further trial should be held on this issue. The Tax Court denied petitioner's motion on November 14, 1973, finding that no gross error in the conduct of the trial had been demonstrated. Petitioner's appeal to the Court of Appeals from the denial of this motion was dismissed for lack of jurisdiction on February 27, 1974, on the ground that the order of the Tax Court

was not a final, appealable order.

A hearing under Tax Court Rule 155 was held before the Tax Court on May 1, 1974, to determine the amount of the deficiency for 1969 which the respondent computed using the rates for single individuals. The petitioner qualified for head of household status and the Tax Court on May 15, 1974 held for the petitioner on this issue (also overlooked at the trial) in spite of a strict rule that new issues are not to be argued at Rule 155 hearings. The Tax Court recognized this oversight on the part of Trial counsel.

The Tax Court entered final decision against petitioner on May 16, 1974. Petitioner's notice of appeal from this decision was timely filed on August 14, 1974.

Oral argument was held on March 5, 1975, before the Court of Appeals and a judgment order without an opinion was rendered on March 10, 1975.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Court of Appeals has decided an issue under the federal Internal Revenue Code of 1954 in a way that is in conflict with an applicable decision of this Court and several cases from the Seventh and Eighth Circuits which held that for purposes of determining whether installment payments of a principal sum under a post-nuptial agreement are payable over a more than ten year period, the period is to begin on the date that the divorce decree was signed by the divorce Court. The divorce decree in this case was handed down on December 11, 1967. The final payment is due on December 1, 1977. This constitutes a period of less than ten years. Clearly the payments are not "period" under Section 71 of the Code and are not taxable to the petitioner Section 71 of the Internal Revenue Code of 1954 provides that a divorced wife's gross income

includes "periodic payments" in discharge of a legal obligation imposed because of the marital or family relationship (inlieu of support). Installment payments of a principal sum are not " periodic" unless payable over a more than ten year period in the absence of a death or remarriage contingency. The respondent contends that the period begins on the date that the post-nuptial agreement was executed by the parties which was October 17, 1967. This contention is contrary to all precedent which has been based both on state law and the common law of contracts.

The aforementioned precedent includes this Court's decision in Cornelia Harris v. Commissioner of Internal Revenue 340 U.S. 106. This case was a gift tax case which arose under the law of the State of Nevada, but neither of these distinctions is relevant. The issue was precisely the same. The case held that the date of the divorce decree should pre-

vail because court approval was required before the agreement was obligatory. The petitioner contends that exactly the same analysis applies to this case regardless of whether it is a gift tax or an income tax case. No legal obligation arises from the post-nuptial agreement until it is approved by the court. The period should begin when an obligation arises.

In this regard Nevada law and Pennsylvania law are identical as reported in Appendix E hereto. The laws of both jurisdictions are permissive and not mandatory i. e. neither requires the courts to incorporate the post-nuptial agreement in the divorce decree in cases involving separate property. The only difference between Nevada and Pennsylvania law is that if the Nevada court declines to incorporate the agreement it loses jurisdiction, whereas in Pennsylvania the courts retain continuing jurisdiction. This difference reinforces the con-

clusion of the Harris case if applied under Pennsylvanis law because Pennsylvania Courts are given broader jurisdiction by the legislature than Nevada Courts to approve or disapprove such agreements. The legislature recognized that agreements between husband and wife required court supervision because of the likelihood of unequal bargaining power between the parties.

Section 71 (C)(2) states that the period begins from the date of the decree, instrument or agreement. Because the agreement in this case is not obligatory, the period must be measured from the date of the only alternative available - the date of the decree. The relevant portions of the post-nuptial agreement which are set forth in Appendix F hereto provide that the agreement shall not be effective until a divorce decree is handed down. The decree was a condition precedent which until signed by the Court was not fullfilled. Thus neither

party had a right to immediate performance nor any judical remedy until the divorce decree was signed. This is a second reason that the ten-year period should begin on the date the divorce decree was signed by the Court.

The Harris case was followed by the Court of Appeals for the Seventh Circuit in Joslin v. Commissioner of Internal Revenue 424 F2d 1223 (CA. 7, 1970) with which the decision in this case directly conflicts. Joslin was an alimony case under Section 71 which arose under Nevada law. The divorce court did not incorporate the agreement in the decree which is not required under Nevada law and the Court of Appeals relying on the Harris case held that the divorce decree imposes the obligation where the divorce court is not bound by the terms of the post-nuptial agreement. The majority opinion stated that the parties may not bind themselves without the explicit direction of the divorce court specifying sur-

vival of the agreement. The law of Pennsylvania is exactly the same in all respects. The Pennsylvania Courts are not bound by the parties agreement and can overturn them if they are found to simply be unfair. A concurring opinion recognized the condition precedent which had to be satisfied prior to any rights or remedies being effected.

The judgement of the Court of Appeals is also in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in Estate of Spicknall v. Commissioner of Internal Revenue 285 F2d 561 (C.A. 8, 1961). In this case the post-nuptial agreement was executed on June 6, 1949. The complaint in divorce was filed on April 19, 1951, and a stipulation dated January 17, 1952 was filed with the Court on January 19, 1952. The due date of the final payment was January 19, 1962. The petitioner argued that the period began on the date that the stipulation was filed but the Court held that

the date of the stipulation, January 17, 1952, began the period. The Court did not hold that the period was to begin on June 6, 1949, the date of execution of the agreement. A stipulation is incidental to a Court proceeding whereas a post-nuptial agreement is a private matter. The stipulation was tantamount to a Court approved post-nuptial agreement.

There is also a direct conflict with a decision of the Court of Appeals for the Seventh Circuit in Blum v. Commissioner of Internal Revenue 177 F2d 670 (C.A 7, 1949) which involved Illinois law. The post-nuptial agreement was executed on February 27, 1935. The divorce decree which incorporated the agreement was signed on February 28, 1935 but was not enrolled in the clerk's office until March 2, 1935. The final payment was due on March 1, 1945 and petitioner argued that the date the decree was enrolled should apply. However the Court held that the date the divorce decree was signed by

the divorce court was the date that the period began. The date of execution of the agreement was not held to begin the period.

In Munderloh v. Commissioner, 48 T.C. 452 (1962) the agreement was held to be effective on execution. This was decided under Maryland law where the Courts may only set aside such agreements if the common law defenses of collusion, mistake or fraud exist. Thus, in that state there is a substantial difference in the law which significantly narrows the authority of the Courts from that which was available at common law in a contractual matter. The reason for holding that the effective date is the date of the decree under Pennsylvania and Nevada law is exactly the same reason for holding otherwise under Maryland law, i.e. what is the extent of the jurisdiction of the Courts? It is very limited in Maryland, very broad in Nevada and ever broader in Pennsylvania.

The aforementioned cases represent all of the cases dealing with the issue of the beginning date of the ten year period. The Courts of Appeals have consistently and without exception chosen the date of the signing of the divorce decree as the date that begins the ten year period under Section 71. If that date is applied in this case then the period is less than ten years and the payments being not "periodic" would not be taxable to the petitioner.

The final payment under the agreement is due to be paid on December 1, 1977 which is less than ten years from December 11, 1967, the effective date. The pertinent section of the agreement reads as follows:

> "4(b) "Ten (10) yearly installments of Forty-five Thousand Dollars ($45,000) the first of which shall be due and paid on the first (1st) day of the month twelve (12) full months after the date of the settlement under Paragraph 9 of this agreement."

The date of settlement was December 12, 1967.

Petitioner contends that the phrase "twelve (12) full months after the date of settlement" modifies the word "month" i. e., since the month is unnamed the phrase is included to define which of the calendar months the drafters of the agreement were referring to. The month, of course, would be December in this case, because the period "twelve (12) full months after the date of settlement" expired on December 12, 1968. The agreement did not specify calendar months but simply said "full months" which are defined as the time from any day of one calendar month to the corresponding day of the next, thereby indicating an expiration date on December 12, one year hence The modifying phrase indicates that December is the month that the drafter of the agreement was referring to because the period described in that phrase expires within the month of December. There is no language such as"the month <u>following</u> the twelve full months". If this

were the case then of course January would be the month. There is nothing in the language to lead a reader to conclude that the due date cannot fall within the twelve month period The phrase does not exist for this purpose. Therefore the due date of payments under this agreement is the first day of December of each year The final payment will be due and payable on December 1, 1977, which is less than ten years from December 11, 1967. In any event an ambiquity must be resolved in petitioner's favor since her husband's attorneys were the drafters.

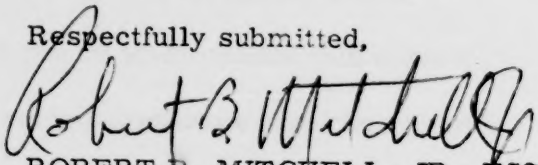
The questions presented by this case are of great and recurring significance in the administration of the tax laws by the Internal Revenue Service The important nature of the issue of whether a post-nuptial agreement is effective on the date it is executed or on the date it is approved by the Courts thus making it obligatory has already been recognized by this Court as recently as Harris v.

Commissioner, supra. If the decision of the Court of Appeals is not reversed neither recipients nor payers of installment payments pursuant to a property settlement can be sure that they are properly and legally excluding the payments from gross income or deducting the payments from adjusted gross income because there is no final determination as to the event that begins the specified time period. Thus the Internal Revenue Service is given the power to arbitrarily chose which party to a post-nuptial agreement will be assessed a deficiency. The thrifty taxpayer will be penalized while the irresponsible spend-thrift will prevail because the Commissioner will be inclined to protect the revenue.

CONCLUSION

The petition for certiorari shoud be granted.

Respectfully submitted,



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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 74-1949

MARION R. HESSE, Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

On Appeal from Decision of the United States Tax Court

NO. 8380-71

Argued March 5, 1975

Before: ADAMS, ROSENN and WEISS, Circuit Judges

JUDGEMENT ORDER

After consideration of all the contentions

asserted by appellant, it is

ADJUDGED AND ORDERED that the decision of the Tax Court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

_____
Circuit Judge

ATTEST:

_____
Thomas R. Quinn
Clerk

Dated: March 10, 1975

APPENDIX " B "

UNITED STATES TAX COURT
WASHINGTON

MARION R. HESS, Petitioner	)	
v.	)	
COMMISSIONER OF INTERNAL REVENUE Respondent	)	
STANLEY H. HESSE, Petitioner	)	Docket Nos. 8380-71 788-72
v.	)	
COMMISSIONER OF INTERNAL REVENUE Respondent	)	

MEMORANDUM AND ORDER

On August 7, 1973, the Court determined that certain payments made by Stanley H. Hesse to Marion R. Hesse were periodic payments in lieu of alimony or support. Marion R. Hesse, 60 T.C. _____(N). 72). On September 6, 1973, Mrs. Hesse filed a motion for further trial and an accom-

panying " affidavit" in support of such motion. The Court thereafter ordered Mr. Hesse and the respondent to file written responses to such motion, and such responses and accompanying memorandums have been filed.

The gravamen of Mrs. Hesse's motion is that the attorney who represented her at trial erred in conceding that the payments at issue were to be paid over a period exceeding 10 years and were thus periodic. Mrs. Hesse refers to the following paragraph in the agreement which sets forth a schedule of payments.

> 4. * * *
> (b) Ten (10) yearly installments of Forty-five Thousand Dollars ($45,000.00), the first of which shall be due and paid on the first day of the month twelve (12) full months after the date of settlement under Paragraph 9 of this agreement. * * *

Through new counsel, she claims that the effective date of the agreement was understood by the parties to be the date of settlement which occurred after the decree of divorce A.V.M. was rendered, and which

in fact occurred during the month of December 1967, and that the final payment called for was to be made on December 1, 1977--less than 10 years after the effective date of the agreement. In the alternative, she claims the language of such paragraph is ambiguous and that the ambiquity should be resolved against Mr. Hesse, whose counsel drafted the agreement.

On the other hand, both the respondent and Mr. Hesse object to the motion filed by Mrs. Hesse. Initially, they vigorously contend that there has been a full and adequate trial of the issues in the case, that Mrs, Hesse was represented by competent counsel in such trial, and that she has failed to show any extraordinary circumstances which warrant the granting of a new trial. They also dispute Mrs. Hesse's proposed interpretation of the agreement; they argue that the effective date of the agreement was October 17, 1967, the date on which it was

executed, and that the final payment was to be made on January 1, 1978. Thus, they argue that the payments were to be made over a period of more than 10 years after the effective date of the agreement. Finally, Mr. Hesse claims that a further trial would be inequitable because it would cause substantial inconvenience and increased costs for him and his witnesses to appear again at a trial in Philadelphia.

We have considered the contentions of all the parties, and because Mrs. Hesse has failed to establish that the circumstances justify a new trial we have decided to deny her request. In reaching this conclusion, we do not reach a definitive decision as to the conflicting interpretations with respect to the dates specified in the agreement.

It is in the discretion of the Court to deny a motion such as the one now before us in order to facilitate the administration of justice and to preclude protracted litigation. Selwyn Operating Cor-

poration, 11 B.T.A. 593, 595 (1928); see also Francis Edward McGillick Foundation v. Commissioner, 278 F.2d 643 (C.A. 3, 1960), affg. and revg. on other issues 30 T.C. 1130 (1958), Chiquita Mining Co. v. Commissioner, 148 F. 2d 306, 310 (C.A. 9, 1945), affg. a Memorandum Opinion of this Court; Scott v. Commissioner, 117 F. 2d 36, 40(C.A. 8, 1941), affg. a Memorandum Opinion of this Court. In considering such a motion, we must recognize that to grant it will delay other persons' rights to have their days in Court. See Pierce Oil Corporation, 30 B.T.A. 469, 474 (1934); see also 2 Casey, Federal Tax Practice, sec. 8.39, p. 284 (1955). Accordingly motions for further trials have been denied in the absence of gross or substantial error or unusual circumstances. Selwyn Operating Corporation, supra at 594; see, e.g., Kirby v. United States, 297 F.2d 466 (C.A. 5, 1961) (result would not have

charged had Court considered additional evidence in rehearing); Marshall v. Commissioner, 240 F. 2d 185 (C.A. 5, 1957), affg. a Memorandum Opinion of this Court (result would not have changed had there been no mistakes in transcript); Automatic Cigarette S. Corp. v. Commissioner, 234 F. 2d 825 (C.A. 4, 1956), affg. a Memorandum Opinion of this Court, cert. denied 352 U.S. 951 (1956)(failure to produce witness at trial did not justify rehearing for additional testimony); Goodman v. Commissioner, 200 F. 2d 681 (C.A. 2, 1953), affg. a Memorandum Opinion of this Court (negligence of petitioner's attorney which caused there to be an absence of substantiating evidence did not warrant rehearing); Covington v Commissioner, 103 F. 2d 201 (C.A. 5, 1939), affg. a Memorandum Opinion of this Court (no prejudice shown even though the petitioner was not represented by counsel.) Although a further trial has been granted

when it was shown that the lawyer was incompetent and lacked authority to represent the petitioner (Chatham Phenix Nat. Bank and Trust Co v. Helvering, 87 F. 2d 547 (C.A. D.C. 1936), revg. an unreported order of this Court), a losing party is not entitled to a rehearing merely because he or his counsel did not exercise prudence or erred in judgement and can make a better case in a second proceeding. Chiquita Mining Co. v. Commissioner, supra at 310; Selwyn Operating Corporation, supra at 594.

In this case, there has been no showing of gross error. The original trial was extensive. The record includes 12 pages of stipulated facts, expert and factual testimony recorded in 273 pages of transcript, and 30 exhibts, including numerous letters and intraoffice records of counsel for both petitioners. Among the witnesses who testified and who were vigorously cross-examined at trial were the at-

torney who initially represented Mr. Hesse and who was an escrow agent under the agreement, the attorney who conducted the negotiations for Mr. Hesse, an attorney who assisted in such negotiations and who drafted early versions of the settlement, and Mr. Hesse. In addition, the records and correspondence of counsel for Mrs. Hesse in the negotiations were offered as evidence by Mrs. Hesse. Such counsel was deceased at the time of trial. During such trial, there eas ample opportunity for Mrs. Hesse to raise the interpretation which she is now urging, but her counsel explicity conceded the issue at that trial.

All parties agree that Mrs. Hesse's previous counsel was competent. He exercised his professional judgment and conceded the issue now being raised by Mrs. Hesse; instead, he chose to argue that the payments were not in lieu of alimony. We cannot say that his judgment was clearly errone-

ous. The interpretations of the agreement now being urged by the parties indicate that there is some ambiguity in the agreement, but the interpretation which Mrs. Hesse's former counsel was willing to accept is certainly a plausible one. Moreover, there is no suggestion that her former counsel lacked the authority to represent her. In fact, she was present in the courtroom during the course of the trial and expressed no lack of confidence in his representation.

To grant a further trial at this time would not only interfere with the other work of the Court, but would also impose additional hardship and expense on both the respondent and Mr. Hesse. Considering such fact, together with all the other circumstances of this case, we are convinced that Mrs. Hesse has failed to show gross error in the conduct of the original trial, and accordingly, it is

ORDERED: That the motion of the petitioner,

Marion R. Hess, for further trial is hereby denied.

(Signed CHARLES R. SIMPSON

Judge

Dated: Washington, D. C.
November 14, 1973

APPENDIX "C"

UNITED STATES TAX COURT

MARION R. HESSE, Petitioner	)	
v.	)	
COMMISSIONER OF INTERNAL REVENUE Respondent	)	Docket Nos. 8380-71
STANLEY H. HESSE, Petitioner	)	788-72
v.	)	Filed 8/7/73
COMMISSIONER OF INTERNAL REVENUE Respondent	)	

W commenced an action seeking a limited divorce and claiming support. H wanted an absolute divorce but lacked the grounds to secure one. H agree to pay $500,000 in installments to W, and she thereupon secured an absolute divorce. Held, the payments to W were periodic payments in lieu of alimony or support under sec. 71(a), I.R.C. 1954. Held further, legal expenses incurred by W in obtaining such payments are deductible under sec. 212(1), I.R.C. 1954.

Patrick W. Kittredge, for the petitioner in

docket No. 8380-71.

William G. O'Neil, for the petitioner in docket No. 788-72

Stephen Cadden, for the respondent.

SIMPSON, Judge: The respondent determined the following deficiencies in the petitioner's Federal income taxes:

Marion R. Hesse

Year	Deficiency
1967	$ 21,338.27
1968	17,972.42
1969	21,055.36

Stanley H. Hesse

1967	26,752.54
1968	21,092.04

Because of concessions, the primary issue remaining for decision is whether payments made by Stanley H. Hesse to his former wife, Marion R. Hesse, pursuant to a written agreement incident to a divorce, were periodic payments made in discharge of a legal obligation incurred by Mr.

Hesse because of the marital or family relationship. If so, we must decide the subsidiary issue of whether legal fees incurred by Marion R. Hesse in obtaining such payments were ordinary and necessary expenses incurred for the production or collection of income.

FINDINGS OF FACT

Some of the facts have been stipulated, and those facts are so found.

The petitioner, Stanley H. Hesse, is an individual who resided in Boca Raton, Florida, at the time his petition was filed in this case. He filed his Federal income tax return for the year 1967 with the district director of internal revenue, Jacksonville, Florida, and he filed his Federal income tax return for the year 1968 with the internal revenue service center, Chamblee, Georgia. Neither of such returns was a joint return with Marion R. Hesse. Mr. Hesse keeps his accounts on the cash re-

ceipts and disbursements method.

The petitioner, Marion R. Hesse, resided in Bethlehem, Pennsylvania, at the time her petition was filed in this case. She filed her Federal income tax returns for the years 1967, 1968 and 1969 with the district director of internal revenue, Philadelphia, Pennsylvania. Mrs. Hesse keeps her accounts on the cash receipts and disbursements method.

The Hesses were married on January 1, 1944, and in the early part of 1966, Mr. Hesse separated from his wife with the intend of obtaining a divorce so that he could remarry.

At the time of the separation, Mr. Hesse was wealthy by virture of gifts from his parents of at least 25,000 shares of stock in Harcourt, Brace and World, Inc. (Harcourt, Brace). During the period 1965 through 1967, the market price of the stock increased from $44 per share to $121 per

share, and the value of Mr. Hesse's stock ranged from $1.5 to $3 million during the period. However, Mr. Hesse's wealth was not reflected in his income, as the stock in Harcourt, Brace paid low dividends, never in excess of $1 per share in any one year Nor was Mr. Hesse's earned income large; for example, in 1966, he reported total earned income of $10,120.04.

The earnings of Mrs. Hesse during the course of her marriage was minimal. However, from 1951 onward, she received at least $119,000 in cash or stock as gifts from her parents, as distributions from trusts set up under the wills of her parents (both of whom were deceased by February 1959), and as gifts from the parents of Mr. Hesse. Thus, at the time of the separation, Mr. Hesse owned stock in her father's two companies, which she had purchased for $48,000 and other investments having a fair market value in excess of $39,000 and she

had contributed regularly to the petitioners' joint checking account, paid of $10,000 of the mortgage principal on the petitioners' residence, and financed a business venture in which she lost $3,000. Mrs. Hesse was also part owner of a commercial property in Allentown, Pennsylvania, which she and her husband purchased as tenants by the entirety. Mrs. Hesse had contributed $15,000 toward the purchase price, and Mr. Hesse had contributed $18,000.

On March 24, 1966, Mr. Hesse filed a complaint for divorce a vinculo matrimonii (divorce A.V.M.) with the Court of Common Pleas of Northampton County, Pennsylvania. Under Pennsylvania law, a divorce A.V.M., often referred to as an absolute divorce, severs the marital relationship between husband and wife. It thereby enables the parties to remarry--which Mr. Hesse desired to do--and, except as may be provided by private agreement, terminates the husband's obligation to support

his wife. Mr. Hesse's position with respect to a settlement at that time was that the assets owned by his wife were sufficient to provide for her support, and the only asset that he suggested giving her was his interest in the jointly held commercial property in Allentown.

On March 21, 1966, Mrs. Hesse contacted an attorney in Bethlehem, Pennsylvania, with regard to her husband's intention of filing a complaint for divorce, and on March 25, 1966, after such complaint was served, she met with such attorney. At that time, the position of Mrs. Hesse was that Mr. Hesse had used the family bank account for his business and put all the money he made back into the business; it was her money that took care of the home.

Thereafter, the parties, through their attorneys, entered into a period of extensive nego - tiations with respect to the rights and obligations

each had against, or owed to, the other. Initially, the petitioners entered into a voluntary agreement concerning the support of their three children. According to the terms of such agreement, Mr. Hesse paid Mrs. Hesse a total of $75 per week. At the time, the petitioners agreed that Mrs. Hesse would retain $25 per week from the rental income of the Allentown commercial property as support.

In an attempt to secure a negotiated settlement, the attorney, on behalf of Mr. Hesse, first offered to pay $50,000 in cash to Mrs. Hesse. Such offer was refused by the attorney for Mrs. Hesse, who indicated that he would recommend settlement for $150,000 in stock or cash. At that time Mrs. Hesse demanded $200,000. On April 25, 1966, she entered into a contingent fee agreement with her attorney, in which she was to pay him 10 percent of the value of any assets received in a settlement arising from the divorce action. By August 1966, the

demands of Mrs. Hesse increased, and her position with respect to a settlement was to accept no less than $500,000. She justified her demand for this amount by pointing to certain statements made by Mr. Hesse in which he stated that he would give one half million dollars to be rid of his wife. It was the position of Mrs. Hesse that if her demands were not accepted by her husband, her attorney was to institute an action for divorce a mensa et thoro (divorce A.M.E.T.). Under Pennsylvania law, a divorce A.M.E.T., often referred to as a limited divorce or a legal separation, permits the wife to obtain permanent alimony and because it does not dissolve the marriage, prevents remarriage by wither party. Thus, if such a divorce were granted, Mr. Hesse would be unable to remarry.

Mr. Hesse was informed on August 30, 1966, of the $500,000 demand by his wife. He rejected the demand, claiming that to raise such money, he would

have to sell some of the Harcourt, Brace stock and he could not sell such stock without the authorization of his parents, which they refused to give. On September 1, 1966, the attorney for Mrs. Hesse was informed of the rejection of her demand.

On November 28, 1966, Mrs. Hesse filed a complaint for divorce A.M.E.T. with the Court of Common Pleas of Northampton County, and in it she requested support to the extent of one-third of the annual income derived from her husband's estate and labor. Mr. Hesse was advised by counsel that he had little or no grounds for obtaining a divorce A.V.M. from Mrs. Hesse, and that she had enough evidence to support an action either for divorce A.V.M. or divorce A.M.E.T. Mr. Hesse was further advised that because of his extensive wealth, his wife would very likely be able to obtain an order for support amounting to between $25,000 and $40,000 per year. It was the opinion of counsel

that in determining the scope of Mr. Hesse's responsibility to provide support for his wife, the court would not look merely at the relatively low income dervived from his Harcourt, Brace stock, but rather would determine the income that could be earned if the value of such stock was invested in income-producing property. In the light of this advice, the position of Mr. Hesse changed, and by March 1967, he was willing to pay either for the support of his wife or to agree to a cash settlement or approximately $300,000. However Mr. Hesse still maintained that he was the wronged party, and he still felt that the demands of Mrs. Hesse were excessive in light of the needs and other incomes of both parties.

The attorneys continued to negotiate. Counsel for Mr. Hesse, sho had earlier offered a settlement involving $6,000 per year as support, guaranteed by a collateral deposit of $300,00 worth of stock, in

creased the offer, in April 1967, to $7,200 per year, guaranteed by a collateral deposit of $350,000 worth of stock. Both offers were made to ensure the annual payments incurred by Mr. Hesse were commensurate with is actual income. On the other hand, counsel for Mrs. Hesse made it clear that his client still demanded $500,000, but that for the convenience of her husband, she would allow payment to be extended over a period of 5 years. However, the bargaining position of Mrs. Hesse was not fixed, and at times, she demanded $500,000, worth of stock or $500,000 in cash payable in one lump sum.

By October 1967, the parties reached a compromise and signed an agreement which eas contingent upon the entry of a decree of divorce A. V. M. In their agreement, the parties expressed a "desire to define their future relationship to each other and to agree upon a full and complete settlement of

their property rights"; and accordingly, the agreement addressed itself to the various rights of the couple. With respect to a cash settlement, it was agreed that Mrs. Hesse was to be paid a liquidated sum of $500,000, the first payment to be made in cash 10 days after entry of a final decree of divorce A. V. M., and the remainder to be paid in 10 annual installments of $45,000 each. The obligation to make the annual payments of $45,000 was to be secured by an escrow deposit of Harcourt, Brace stock worth $450,000, and the payments were to be made regardless of whether either party died.

With respect to other items, the agreement called for Mr. Hesse to pay $25 weekly support for each child until such child reached the age of 18 years, or entered college, and thereafter to provide each child with a 4-year, approved college education. Both parties confirmed the irrevocable status of prior gifts of stock to each of the children.

The family residence was to be the sole separate property of Mrs. Hesse, and the commercial property in Allentown was to be the sole and separate property of Mr. Hesse, subject to the understanding tht his wife was to receive $15,000 of the proceeds in the event such property was sold. All personalty at the family residence was given to Mrs. Hesse, except for a few personal and hobby items which were retained by Mr. Hesse.

Mrs. Hesse waived her right to any support for herself and the right to costs, counsel fees, or alimony, except that Mr. Hesse agreed to pay any such reasonable counsel fee incurred by his wife in connection with the proceedings. Each party released and waived all rights of curtesy, dower, statutory share in the other's estate, and the right to take against the will of the other; each party agreed to assume full responsibility for all his own debts and to indemnify the other against claims resulting from

his debts; and each party waived and released all claims, debys, and causes of action against the other except those arising out of the agreement and any extant causes for a divorce.

There was no designation in the agreement as to what consideration was being exchanged by each party for each right or property, and there was no label as to what each right or property repeesented except that the $25 weekly payments to the children were support.

After the agreement was executed, the action for divorce A. M. E. T. brought by Mrs. Hesse was amended on October 23, 1967, to an action for divorce A. V. M., and an appearance by counsel was entered for Mr. Hesse. All the materials called for under the escrow terms of the agreement were deposited in escrow, and a final decree of divorce was entered on December 11, 1967.

Mr. Hesse thereafter paid Mrs. Hesse $50,000 in 1967 and $45,000 in both 1968 and 1969. Mr. Hesse also paid $5,000 to Mrs. Hesse's attorney, representing his counsel fee in the divorce proceedings. Mrs. Hesse paid her attorney $10,000 in 1967 in accordance with the contingent fee agreement and executed a note for $40,000 payable annually in the amount of $5,000 per year. Under the terms of such note, Mrs. Hesse paid her attorney $10,000 in 1969 representing payment for the years 1968 and 1969.

In his notices of deficiency, the respondent had taken inconsistent positions in order to assure the consistent treatment of the payments by Mr. Hesse to Mrs. Hesse. In the notice of deficiency sent to Mr. Hesse, the respondent determined that the payments made in 1967 and 1968 were not alimony payments but were payments under a property settlement. In his notice of deficiency to Mrs. Hesse,

he determined that the payments which she received in 1967, 1968, and 1969 were periodic payments of alimony taxable to her under section 71(a) of the Internal Revenue Code of 1954.[1]

OPINION

We will consider first whether the payments at issue were periodic payments made in discharge of a legal obligation incurred by Mr. Hesse becaude of the marital or family relationship.

This issue involves sections 71 and 215. In pertinent part, section 71(a)(1) provides:

> If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments*** received after such decree in discharge of***a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

Section 215 allows the husband to deduct amounts which are paid during his taxable year and which are includable[1] in the gross income of the wife by virture of section 71.

[1] All statutory references are to the Internal Revenue Code of 1954.

Both petitioners recognize that the payments at issue were periodic. Although such payments were in discharge of a principal sum specified in the decree, they fall within the exception of section 71(c)(2), because they were payable over a period in excess of 10 years from the date of the agreement. However, Mrs. Hesse contends that such payments were made in fulfillment of a property settlement agreement and were intended as compensation for her property rights. She argues that many of the factors which generally indicate a pro-

perty settlement are present in the agreement executed by the petitioners. On the other hand, Mr. Hesse argues that the payments were made in recognition of Mrs. Hesse's right to support. He contends that Mrs. Hesse had but one valuable right for which she was not compensated in other sections of the agreement, that being her right to support, and that the negotiations clearly indicate that the $500,000 at issue was intended as compensation for the relinquishment of such right. The respondent has taken the stance of a disinterested stakeholder.

We have given careful consideration to all the relevant evidence in the record in order to determine the purpose of the payments at issue, and on the basis of such consideration, we find the payments were intended to be, and actually where, in lieu of support.

The legislative purpose behind sections 71

and 215 is unifromity of treatment for amounts paid in the nature of alimony, or in lieu of alimony, regardless of variances in the laws of the different States, H. Rept. No. 2333, 77 Cong., 2d Sess., 1942-2 C.B. 372, 427; S. Rept. No. 1631, 77th Cong., 2d Sess. 1942-2 C.B. 504, 568; Taylor v. Campbell, 335 F. 2d 841 (C.A. 5, 1964); Bardwell v. Commissioner, 318 F.2d 786, 789 (C.A. 10, 1963), affg. 38 T.C. 84 (1962); Grant R. Bishop 55 T.C. 720, 724 (1971); Thomas E. Hogg, 13 T. C. 361 (1949). The regulations promulgated under section 71 provide that such section applies only to payments made because of the family or marital relationship in recognition of the general obligation of support. Sec. 1.71-1(b)(4), Income Tax Regs. Payments made in recognition of such obligation are includable in the gross income of the wife under section 71 regardless of the absence of alimony under State law. See Taylor v. Campbell, supra; Bardwell

Commissioner, supra; Thomas E. Hogg, supra; Tuckie G. Hesse, 7 T.C. 700 (1946). On the other hand, payments which are in the nature of a division of property are capital in nature, and therefore, not subject to the provisions of section 71 even though periodic and incident to a divorce. Ernest H. Mills, 54 T.C. 608 (1970), affg. 442 F.2d 1149 (C.A. 10. 1971); Lewis B. Jackson, Jr., 54 T.C. 125 (1970); see also Wilma Thompson, 50 T.C. 522, 525 (1968).

Whether the payments in fact represent alimony or are in consideration of an interest in property is a question that turns upon the facts, an and not upon any labels that may or may not have been placed upon them. Ann Hairston Ryker, 33 T.C. 924, 929 (1960); see also Taylor v. Campbell, supra at 845; William M. Joslin, Sr., 52 T.C. 231, 236 (1969), affd. 424 F.2d 1223 (C.A. 7, 1970); Blanche Curtis Newbury, 46 T.C. 690, 694

(1966). One factor looked to in determining the nature of a particular payment has been the negotiations preceding the divorce. See Enid P. Mirsky, 56 T.C. 664, 673-674 (1971). Grant R. Bishop, supra at 725-726; Floyd H. Brown, 16 T.C. 623, 631 (1951). Here, such factor indicates the payments were in lieu of alimony or support.

When the circumstances of this case are examined, it is altogether clear that Mrs. Hesse had a claim for substantial support and that the $500,000 was paid to her in satisfaction of that claim. Although, Mr. Hesse filed the first action for divorce, he lacked the grounds to secure one. When Mr. Hesse refused to agree to the settlement demand by Mrs. Hesse, she then filed her action for a divorce A.M.E.T. and her claim for support. Thereafter, Mr. Hesse's attorney advised him as to the weakness of his position and his potential liability for the payment of support, and the offers of support increased. Clear-

ly, Mrs. Hesse had no basis for claiming $500,000, other than her claim for support, and she relinquished no right of significant value other than her claim for support. Compare Lewis B. Jackson, Jr., supra, in which the wife had no right to support and such fact was an indication that the agreement represented a property settlement.

Furthermore, for the payments at issue to have been in discharge of a division of property, it must be demonstrayed that Mrs. Hesse had an interest in property which she was relinquishing and for which the $500,000 was compensation. Riddell v. Guggenheim, 281 F. 2d 836, 840-841 (C.A. 9, 1960); see, e.g., Ernest H. Mills, supra. No such interest has been demonstrated by Mrs. Hesse. She retained all the property which had been given to her and which she held in her own name. The record indicates that the property in which Mrs. Hesse had an interest with Mr. Hesse was limited to the family

residence, which was in her name and which was paid for with her money, and the contents and furnishings of such residence; both were acknowledged to be hers in other paragraphs of the agreement. She also had an interest in the commercial property in Allentown, and although such property was given to Mr. Hesse, it was agreed that in the event of sale, Mrs. Hesse was to receive $15,000 of the proceeds. These were the only properties dealt with in the agreement.[2] Pennsylvania is not a community property State, and Mrs. Hesse has shown no interest in the separate estate of Mr. Hesse, over and beyond the request for support, based on the income of such property. See William M. Joslin, Supra at 236-237; compare Ernest H. Mills, supra; Lewis B. Jackson, Jr., supra. Any future rights that she may have had in his property were speculative and of no significant value, and there is no indication that they were the subject of the ne-

gotiations which led to the agreement.

Although Mrs. Hesse contends that she wanted to be repaid for the contributions which she made to the family expenses during the course of the marriage, she has not demonstrated the extent of such expenditures. Moreover, there is no evidence indicating that the amount of such expenditures was computed and that the demand for $500,000 was in any way related to the amount of such expenditures. Compare McCombs v. Commissioner, 397 F. 2d 4 (C.A. 10, 1968), affg. a Memorandum Opinion of this Court; Bernatschke v. United States, 364 F. 2d 400 (Ct. Cl. 1966); Ernest H. Mills, supra; Lewis B. Jackson, Jr., supra (all of which involved payments that were related in amount to the property interest of the wife.)

There is some indication in the record that the petitioners may have jointly owned property in Florida and that such property may have been given to Mr. Hesse in a separate agreement or transaction; however, neither petitioner has alluded to it, and the record is not clear.

Mrs. Hesse argues that in this case many factors indicate the agreement was a property settlement. She points to the presence of a fixed principal sum in the agreement; the absence of contingencies which would decrease or stop payment of such principal sum in the event of her remarriage, the death of either party, or a change in the status of Mr. Hesse's finances; the presence of a security arrangement to ensure payment by Mr. Hesse; and the small weekly sum she received as support during the course of negotiations. See, e.g. McCombs v. Commissioner, supra; Bernatschke v. United States, supra; Soltermann v. United States, 272 F. 2d 387 (C.A. 9, 1959); Grant R. Bishop, 55 T.C. 720 (1971); but see Phinney v. Mauk, 411 F. 2d 1196 (C.A. 5, 1969); Porter v. Commissioner, 388 F. 2d 670 (C.A. 6, 1968), affg. per curiam a Memorandum Opinion of this

[3] For a recent example, see George C. DeSmyer, T.C. Memo. 1973-90 (April 17, 1973).

Court; Wilma Thompson, 50 T. C. 522 (1968). Although these factors have been relied on by this and other courts in determining that certain agreements were in the nature of property settlements, such factors are not always controlling, and in this case, they merely indicate that Mrs. Hesse was in a substantially stronger bargaining position than was Mr. Hesse.

Accordingly, for the reasons stated, we hold that the payments in issue were periodic payments in lieu of alimony and are includable in the gross income of Mrs. Hesse and deductible by Mr. Hesse.

In view of that holding, we reach the subsidiary issue of whether the legal fees paid by Mrs. Hesse to secure the agreement to pay her $500,000 are deductible under section 212(1). In pertinent part, section 212(1) allows an individual to deduct all the ordinary and necessary expenses paid dur-

ing the taxable year for the production or collection of income. This Court has held in the past that amounts paid by a wife to her attorneys, allocable to obtaining alimony includable in her gross income, are deductible under section 212(1). Ruth K. Wild, 42 T.C. 706 (1964); see Jane U. Elliott, 40 T.C. 304, 314 (1963), Elsie P. Gale, 13 T.C. 661 (1949), affd. 191 F. 2d 79 (C.A. 2, 1951).

Mrs. Hesse entered into a contingent fee agreement with her attorney in which she was to pay him 10 percent of the value of any assets she received in a settlement. This agreement was separate and distinct from the arrangement to pay the attorney for his services in the divorce proceedings; that fee was paid by Mr. Hesse. In accordance with the contingent fee agreement, Mrs. Hesse paid her attorney $10,000 in 1967 and under the terms of the promissory note she paid the attorney $10,000 in 1969, representing payment for the years 1968

and 1969. Because the payments received by Mrs. Hesse under her settlement with Mr. Hesse were includable in her gross income under section 71 (a), the fees she paid her attorney to obtain such payments are deductible. See sec. 1. 262-1(b)(7), Income Tax Regs. Because Mrs. Hesse uses the cash methor of accounting, such fees are deductible in the years actually paid.

Decisions will be entered under Rule 50

APPENDIX "D"

STATUTES AND REGULATIONS INVOLVED

INTERNAL REVENUE CODE OF 1954

Section 71

Section 215

TREASURY REGULATIONS UNDER THE 1954 CODE:

Section 1.71-1

SPECIFIC PROVISIONS OF THE STATUTES AND REGULATIONS RELIED UPON IN PERTINENT PART

STATUTES

(a) GENERAL RULE. - (1) Decree of Divorce or Separate Maintenance. - If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separa-

tion.

* * *

"(c)" PRINCIPAL SUM PAID IN INSTALLMENTS. - (1) General Rule. - For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments. (2) Where Period For Payment is More Than 10 Years. - If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extend of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

* * *

REGULATIONS

Section 1.71-1

"(a) In general. Section 71 provides rules

for treatment of certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or separated... For rules relative to the deduction by the husband of periodic payments not attributable to transferred property, see section 215 and the regulations thereunder...

"(b) Alimony or separate maintenance payments received from the husband. (1) Decree of divorce or separate maintenance (i) In the case of divorce or legal separation, paragraph (1) of section 71 (a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after a decree of divorce or of separate maintenance. Such periodic payments must be made in discharge of a legal obligation imposed upon or incurred by the husband because of the marital or family relationship under a court order or decree divorcing or legally separating the husband and wife or a written instrument incident to such divorce status or legal separation status.

* * *

"(4) Scope of section 71(a). Section 71 (a) applies only to payments made because of the family or marital relationship in recognization of the general obligation to support which is made specific by the decree, instrument, or agreement. Thus, section 71(a) does not apply to that part of any periodic payment which is attributable to the repayment by the husband of, for example, a bona

fide loan previously made to him by the wife, the satisfaction of which is specified in the decree, instrument, or agreement as a part of the general settlement between the husband and wife.

* * *

"d" Periodic and installment payments. (1) Ingeneral, installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree, instrument, or agreement are not considered " periodic payments" and therefore are not to be included under section 71(a) in the wife's income.

(2) An exception to the general rule stated in subparagraph (1) of this paragraph is provided, however, in cases where such principal sum, by the terms of the decree, instrument, or agreement, may be or is to be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement. In such cases, the installment payment is considered a periodic payment for the purposes of section 71(a) but only to the extent that the installment payment, or sum of the installment payments, received during the wife's taxable year does not exceed 10 percent of the principal sum. This 10 percent limitation applies to installment payments made in advance but does not apply to delinquent installment payments for a prior taxable year of the wife made during her taxable year.

(3)(i) Where payments under a decree,

instrument, or agreement are to be paid over a period ending 10 years or less from the date of such decree, instrument, or agreement, such payments are not installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree, instrument, or agreement (and are considered periodic payments for the purposes of section 71(a) only if such payments meet the following two conditions:

(a) Such payments are subject to any one or more of the contingencies of death or either spouse, remarriage of the wife, or change in the economic status of either spouse and

(b) Such payments are in the nature of alimong or an allowance for support.

(ii) Payments meeting the requirements of subdivision (i) are considered periodic payments for the purposes of section 71(a) regardless of whether -

(a) The contingencies described in subdivision (i)(a) are set forth in the terms of the decree, instrument, or agreement, or are imposed by local law, or

(b) The aggregate amount of the payments to be made in the absence of the occurrence of the contingencies described in subdivision (i)(a) of this subparagraph is explicitly stated in the decree, instrument, or agreement or may be calculated from the

face of the decree, instrument, or agreement, or

(c) The total amount which will be paid may be calculated actuarially.

(4) Where payments under a decree, instrument, or agreement are to be paid over a period ending more than ten years from the date of such decree, instrument, or agreement, but where such payments meet the conditions set forth in subparagraph (3))i) of this paragraph, such payments are considered to be periodic payments for the purpose of section 71 without regard to the rule set forth in subparagraph (2) of this paragraph. Accordingly, the rules set forth in subparagraph (2)of this paragraph are not applicable to such payments.

APPENDIX "E"

The Pennsylvania Statutory Provision Found at 23 P. S. §15 Recites inter alia:

> "Original Jurisdiction of Courts of Common Pleas. The several Courts of Common Pleas of this Commonwealth.. shall have original jurisdiction of cases of divorce from the bonds of matrimony from bed and board and for the annulment of void or voidable marriages, and, where they have jurisdiction, may determine in one action the following matters, and issue an appropiate decrees or orders (sic) with reference thereto, and may retain continuing jurisdiction thereover: (a) the determination and disposition of property rights andinterests between spouses, including any rights created by any antinuptial or postnuptial agreement and including the partition of property held as tenants by the entireties or otherwise, and any accounting between them and the order of any alimony, maintenance, counsel fees, costs, or other allowance authorized by law. "(emphasis supplied)

Section 125.150(3) and (5) of the Nevada Code Provide as follows:

> 125.150 Alimony and adjudication of property rights; award of attorney's fee; subsequent modification by court

on stipulation of parties.

3. The Court may also set apart such portion of the husband's property for the wife's support and the support of their children as shall be deemed just and equitable.

4. In the event alimony has been awarded to the wife, or the court otherwise adjudicates the property rights of the parties, or an agreement by the parties, settling their property rights has been approved by the Court, whether or not the Court has retained jurisdiction to modify the same, such alimony so awarded, such adjudication of property rights, and such agreements settling property rights, may nevertheless at any time thereafter be modified by the Court upon written stipulation duly signed and acknowledged by the parties to such action, and in accordance with the terms thereof. (Part 25:33: 1861; A 1939, 18; 1943, 117; 1949, 54; 1943 NCL §9463)--(NRS A 1961, 401).

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1514

MARION R. HESSE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that payments received by her under an agreement incident to a divorce were not includible in her gross income under Section 71(a) of the Internal Revenue Code of 1954.

The pertinent facts are as follows: In 1966, petitioner and her then husband Stanley Hesse each instituted an action for divorce. In October 1967, petitioner and her husband entered into an agreement setting forth their respective marital and property rights. Under the agreement, petitioner was to receive $500,000, with the first payment to be made ten days after entry of the final divorce decree and the remainder to be paid in ten annual installments. In accordance with the agreement, Stanley Hesse paid petitioner $50,000 in 1967 and $45,000 in each of the years 1968 and 1969 (Pet. App. C 40-50).

On audit, the Commissioner of Internal Revenue determined that the amounts paid to petitioner under the agreement were includible in her gross income under Section 71(a) of the Internal Revenue Code of 1954.[1] The Tax Court found that the payments in question were "periodic payments" in discharge of a legal obligation within the meaning of Section 71(a) and were not made in satisfaction of petitioner's property rights. It accordingly upheld the Commissioner's determination (Pet. App. C 35-63) and the court of appeals affirmed in a brief order (Pet. App. A 23-24).[2]

1. Petitioner principally argues (Pet. 10-20) that the Tax Court erred in denying her a new trial for the purpose of showing that the payments were not "periodic" and therefore not includible in gross income. In her petition to the Tax Court (R. 6a-9a)[3] and at trial, petitioner contested the Commissioner's determination solely on the ground that her ex-husband made the payments in question in satisfaction of her property rights. In making this claim, petitioner never relied upon Section 71(c),

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[1]For protective purposes, the Commissioner disallowed the deductions claimed by Stanley Hesse for the payments. Under Section 215 of the Code, payments incident to a divorce or separation decree are deductible by the payor-spouse to the extent they are includible in the recipient spouse's income under Section 71.

[2]At the same time, the Tax Court entered a decision in favor of Stanley Hesse. The Commissioner appealed that decision to the Fifth Circuit in order to protect the revenue in the event the Tax Court's decision in this case was reversed. Further proceedings in that appeal have been deferred until the decision is final in this case.

[3]"R." refers to the record appendix in the court of appeals.

which provides that installment payments in discharge of a principal sum are not "periodic payments" includible in the recipient's gross income, unless they are payable over a period longer than ten years. Indeed, at trial, petitioner's counsel specifically conceded (R. 111a-112a) that the payments in issue were periodic payments within the meaning of Section 71(a) because the agreement provided that they were payable over a period of more than ten years.

After the Tax Court had rendered its decision, petitioner obtained new counsel and filed a motion for further trial for the purpose of establishing that the payments were not periodic. She alleged that her prior counsel had erroneously conceded this point, as a result of misunderstanding the provisions of the settlement agreement dealing with the timing of the eleven required installment payments (R. 39a-49a). The Tax Court denied the motion for further trial, finding that petitioner had been represented by competent counsel, that no "gross error" in the conduct of the trial had been shown, and that the initiation of further evidentiary proceedings in the case would impose an unwarranted additional burden on both Stanley Hesse and the Commissioner (Pet. App. B 31-34).

There is no basis for further review of the Tax Court's denial of petitioner's motion for a further trial. The Tax Court has broad discretion in deciding whether to grant a rehearing, and its rulings in this regard are not normally subject to review except upon a clear showing of abuse of discretion. *Nor-Cal Adjusters* v. *Commissioner*, 503 F. 2d 359 (C.A. 9); *Chiquita Mining Co.* v. *Commissioner*, 148 F.2d 306, 310 (C.A. 9); *Francis Edward McGillick Foundation* v. *Commissioner*, 278 F.2d 643, 649 (C.A. 3).

The record here shows that the Tax Court acted within its discretion in denying petitioner's motion. Petitioner never contended that her trial counsel was incompetent or unauthorized to represent her. Indeed, she admitted in the Tax Court that he was "able and competent" in the conduct of the issue presented to the court (R. 44a). The concession by petitioner's trial counsel that the payments in question were periodic was not unreasonable in view of the ambiguous language of the settlement agreement (R. 158a-159a). At worst, the concession represented an error of judgment by petitioner's trial counsel and, as such, presented no compelling reason for the Tax Court to conduct an additional evidentiary proceeding.

Contrary to petitioner's assertion (Pet. 11, 13), the decision below does not conflict with *Harris* v. *Commissioner*, 340 U.S. 106. As petitioner concedes (Pet. 11), *Harris* was a gift tax case and did not involve the propriety of the Tax Court's refusal to reopen a decided case to consider a new theory the taxpayer wanted to assert. Moreover, there is no conflict with the decisions of the Seventh and Eighth Circuits (Pet. 14-16) dealing with the computation of the ten-year period under Section 71(c). Since petitioner conceded the Section 71(c) point, neither the Tax Court nor the court of appeals had any occasion to make any determination with respect to that issue.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.